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US DISTRICT COURT  
DISTRICT OF ALASKA

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1 Traeger Machetanz, Esq.  
2 Gloria Ho, Esq.  
3 OLES MORRISON RINKER & BAKER, LLP  
4 745 Fourth Avenue, Suite 502  
5 Anchorage, AK 99501-2136  
6 Telephone: (907) 258-0106  
7 Telecopier: (907) 258-5519

8 Attorneys for Nugget Construction Co.,  
9 Inc., and USF&G, Defendants

10 IN THE UNITED STATES DISTRICT COURT

11 FOR THE DISTRICT OF ALASKA AT ANCHORAGE

12 UNITED STATES OF AMERICA for the )  
13 use of NORTH STAR TERMINAL & )  
14 STEVEDORE COMPANY, d/b/a NORTHERN )  
15 STEVEDORING & HANDLING, and NORTH )  
16 STAR TERMINAL & STEVEDORE COMPANY, )  
d/b/a Northern Stevedoring & )  
Handling, on its own behalf, )  
Plaintiffs, )  
and )  
UNITED STATES OF AMERICA for the )  
use of SHORESIDE PETROLEUM, INC., )  
d/b/a Marathon Fuel Service, and )  
SHORESIDE PETROLEUM, INC., d/b/a )  
Marathon Fuel Service, on its own )  
behalf, )  
Intervening Plaintiffs, )  
and )  
METCO, INC., )  
Intervening Plaintiff, )  
vs. )  
NUGGET CONSTRUCTION, INC.; SPENCER )  
ROCK PRODUCTS, INC.,; UNITED )  
STATES FIDELITY AND GUARANTY )  
COMPANY; and ROBERT A. LAPORE, )  
Defendants. )

NO. A98-009 CIV (HRH)

DEFENDANT NUGGET  
CONSTRUCTION, INC.'S  
MEMORANDUM IN OPPOSITION  
TO PLAINTIFF AND USE-  
PLAINTIFF NORTH STAR  
TERMINAL AND STEVEDORING  
COMPANY'S MOTION TO  
COMPEL DISCOVERY

1                   Defendant Nugget Construction, Inc. ("Nugget") submits  
2 this memorandum in opposition to Plaintiff and Use-Plaintiff  
3 North Star Terminal and Stevedoring Company's ("North Star")  
4 Motion to Compel Discovery.

5

6                   I. NUGGET'S FINANCIAL CONDITION

7

8                   A. North Star's Discovery Requests are Overly Broad and Unduly  
Burdensome

9

10                  North Star is engaging in a costly and disruptive  
11 fishing expedition of Nugget's privileged, confidential, and  
12 proprietary financial information. Through its discovery  
13 requests, North Star seeks to know all Nugget financial  
14 information from 1996 to present, i.e., asset, property and  
15 account receivables, financial and tax statements, total gross  
16 net income, gross revenue, pre-tax profit, equity per year. See  
17 attached Exhibit A, Nugget's Responses to North Star's First Set  
18 of Discovery Requests, pp. 14-23. The burden of these discovery  
19 requests and the intrusiveness into Nugget's financial affairs  
20 is both enormous and unwarranted.

21

22                  Nugget opposes North Star's motion to compel the  
23 discovery of Nugget's financial condition. North Star's basis  
24 *U.S. ex rel. North Star, et al. v. Nugget Construction, et al.*  
25 Case No. A98-009 CIV (HRH)  
Defendant Nugget Construction, Inc.'s Memorandum  
in Opposition to Plaintiff and Use-Plaintiff  
North Star Terminal and Stevedoring Company's  
Motion To Compel Discovery -- Page 2 of 18

1 for obtaining Nugget's financial information is the remote  
2 possibility of obtaining a punitive damages award. However,  
3 North Star has provided absolutely no evidence to meet the clear  
4 and convincing standard under either the pre-1997 or post-1997  
5 punitive damages statute to warrant the discovery of Nugget's  
6 financial information.  
7

8                 The Court should restrain North Star's unfettered  
9 probing into Nugget's financial information. Fed. R. Civ.  
10 P. 26(b)(1) provides in pertinent part that "[p]arties may  
11 obtain discovery regarding any matter, not privileged, that is  
12 relevant to the claim or defense of any party . . ." The 2000  
13 changes to Rule 26(b)(1) narrowed the scope of discovery to  
14 allow the discovery of unprivileged facts "relevant to the claim  
15 or defense of any party," as opposed to the prior rule allowing  
16 discovery of facts "relevant to the subject matter involved in  
17 the pending action." Additionally, Fed. R. Civ. P. 26(b)(2)  
18 provides that the Court may limit discovery to the extent that  
19 discovery requests do not meet the relevancy standard or are  
20 unreasonably cumulative, duplicative, burdensome, or expensive.  
21 North Star's discovery regarding Nugget's financial condition  
22

23                 *U.S. ex rel. North Star, et al. v. Nugget Construction, et al.*  
24 Case No. A98-009 CIV (HRH)  
25 Defendant Nugget Construction, Inc.'s Memorandum  
in Opposition to Plaintiff and Use-Plaintiff  
North Star Terminal and Stevedoring Company's  
Motion To Compel Discovery -- Page 3 of 18

1 clearly are unreasonably burdensome given the narrow basis upon  
 2 which North Star's motion rests.

3

4       B. A Prerequisite Showing of Liability for Punitive Damages is  
Required Before Pretrial Discovery of Financial Information  
is Allowed.

5

6           At the time North Star asserted its claims for  
 7 punitive damages, the Alaska punitive damages statute, effective  
 8 August 7, 1997, limited the circumstances under which evidence  
 9 of a defendant's financial condition could be discovered and  
 10 admitted. See AS 09.17.020. Since North Star's punitive  
 11 damages claim accrued after August 7, 1997,<sup>1</sup> the post-1997  
 12 punitive damages statute applies in this case. That statute  
 13 expressly authorized a bifurcation of the liability and punitive  
 14 damages phases of trial. Thus, the evidence of a defendant's  
 15 wealth is not discoverable or admissible until after the trier  
 16 of fact has determined the defendant's liability for punitive  
 17 damages. The Legislature made it explicitly clear that prima  
 18

---

19

20

21       <sup>1</sup> North Star did not assert its punitive damages claim until August 31, 2005.  
 22 Presumably, North Star was unaware of the existence of these claims until  
 23 shortly before that time, otherwise they would be time barred if North Star  
 24 was aware of the punitive damages claims at the time of initial filing yet  
 25 failed to assert such claims. Consequently, given North Star's presumed lack  
 of knowledge of the basis for such claims, North Star's right to assert a  
 punitive damages claim did not arise until after the 1997 amendments.

U.S. ex rel. North Star, et al. v. Nugget Construction, et al.

Case No. A98-009 CIV (HRH)

Defendant Nugget Construction, Inc.'s Memorandum  
 in Opposition to Plaintiff and Use-Plaintiff  
 North Star Terminal and Stevedoring Company's  
 Motion To Compel Discovery -- Page 4 of 18

1 facie proof of a defendant's liability for punitive damages is  
2 required before a defendant's wealth or financial condition may  
3 be discovered. See generally AS 09.17.020 and specifically  
4 AS 09.17.020(e).

5  
6 North Star suggests that the statute allows for the  
7 discovery of a defendant's wealth prior to the finding of  
8 punitive damages liability. On the contrary, the statute  
9 unambiguously provides that "**discovery** of evidence that is  
10 relevant to the amount of punitive damages to be determined  
11 under (c) (3) or (6) of this section **may not be conducted until**  
12 **after** the fact finder has determined that an award of punitive  
13 damages is allowed . . . ." Further, North Star's concerns that  
14 post-discovery of a defendant's wealth would lead to absurd  
15 results is unfounded. The statute directly addresses this  
16 concern by providing that

17  
18 the court may issue orders as necessary,  
19 including directing the parties to have the  
20 information relevant to the amount of  
21 punitive damages to be determined under  
22 (c) (3) or (6) of this section available for  
23 production **immediately at the close of the**  
**initial trial** in order to minimize the delay  
between the initial trial and the separate

24  
25 *U.S. ex rel. North Star, et al. v. Nugget Construction, et al.*  
Case No. A98-009 CIV (HRH)  
Defendant Nugget Construction, Inc.'s Memorandum  
in Opposition to Plaintiff and Use-Plaintiff  
North Star Terminal and Stevedoring Company's  
Motion To Compel Discovery -- Page 5 of 18

1 proceeding to determine the amount of  
2 punitive damages.

3 Moreover, consideration of the financial condition of  
4 a party is a relevant factor in a claim for punitive damages  
5 only after the plaintiff proves by clear and convincing evidence  
6 that the wrongdoer's conduct was outrageous. In *Sturm, Ruger &*  
7 *Co., Inc., v. Day*, 594 P.2d 38, 46-49 (Alaska 1979), overruled  
8 on other grounds, *Dura Corp. v. Harned*, 703 P.2d 396 (Alaska  
9 1985), the court found that punitive damages were awardable in a  
10 strict liability case if a plaintiff met the clear and  
11 convincing evidentiary standard. The court considered the  
12 wealth of a defendant as a relevant factor that bears on the  
13 excessiveness of a punitive damages award only after sufficient  
14 evidence sustained a jury's award of punitive damages. *Id.* at  
15 47-48. Hence, there is no reason why North Star should have  
16 discovery of Nugget's financial condition until after the trier  
17 of fact has determined if punitive damages are appropriate.  
18

19 North Star cites cases in its motion to justify  
20 obtaining Nugget's privileged, confidential, and proprietary  
21 financial information that fail to address the clear limitation  
22

23  
24 *U.S. ex rel. North Star, et al. v. Nugget Construction, et al.*  
25 Case No. A98-009 CIV (HRH)  
Defendant Nugget Construction, Inc.'s Memorandum  
in Opposition to Plaintiff and Use-Plaintiff  
North Star Terminal and Stevedoring Company's  
Motion To Compel Discovery -- Page 6 of 18

1 on discovery of financial information contained in the  
2 applicable Alaska statute. Moreover, North Star misconstrues  
3 the punitive damages discussion in *Norcon Inc. v. Kotowski*, 971  
4 P.2d 158, 173-177 (Alaska 1999). The *Norcon* court dealt with  
5 the issues of whether there was sufficient evidence to present  
6 the question of punitive damages to the jury, and whether the  
7 jury's award of punitive damages was excessive and required  
8 remittitur. *Id.* at 173. The jury had already rendered a  
9 verdict on punitive damages before the court allowed the jury to  
10 consider the amount of the award. Thus, the defendant's  
11 financial condition as discussed in *Norcon* was a factor to be  
12 considered after the defendant was found liable for punitive  
13 damages.  
14

15  
16 The pre-1997 and post-1997 punitive damages statute  
17 requires a prerequisite showing of liability before  
18 consideration of financial information is allowed. Thus, the  
19 Court should deny North Star's motion to compel Nugget's  
20 financial information based on the unequivocal language of the  
21  
22  
23  
24

25 *U.S. ex rel. North Star, et al. v. Nugget Construction, et al.*  
Case No. A98-009 CIV (HRH)  
Defendant Nugget Construction, Inc.'s Memorandum  
in Opposition to Plaintiff and Use-Plaintiff  
North Star Terminal and Stevedoring Company's  
Motion To Compel Discovery -- Page 7 of 18

1 punitive damages statute and to promote the legislative intent  
 2 of the statute.<sup>2</sup>

3       C. North Star Has Not Shown Prejudice

4                   North Star asserts that the pre-1997 punitive damages  
 5 statute is applicable in this lawsuit because the accrual date  
 6 of North Star's state law claims occurred prior to August 7,  
 7 1997. However, North Star's argument ignores that its punitive  
 8 damages claims were filed well after AS 09.17.020 went into  
 9 effect. North Star's contention of the inapplicability of the  
 10 post-1997 statute is misplaced since its state law actions  
 11 accrued after August 7, 1997, as pointed out above.

12                   Furthermore, even if the Court did not apply  
 13 AS 09.17.020, North Star has failed to make any showing of any  
 14 need to learn of Nugget's financial conditions at this point in  
 15 time. Other than for purposes of evaluating an appropriate

---

16                   <sup>2</sup> The legislative intent of the 1997 amendment further supports the  
 17 interpretation of the punitive damages statute: to provide for reasonable,  
 18 but not excessive, punitive damage awards against tortfeasors sufficient to  
 19 deter conduct and practices that harm innocent Alaskans while not hampering a  
 20 positive business environment by allowing excessive penalties. (Am § 10 ch  
 21 26 SLA 1997, Section 1, paragraph (2)). Further, Chapter 26, Section 48  
 22 provides that AS 09.17.020(e) has the effect of amending Rule 26, Alaska  
 23 Rules of Civil Procedure, by limiting discovery in certain actions.

1       penalty if punitive damages are imposed, North Star wants  
2       Nugget's financial information to ascertain Nugget's ability to  
3       satisfy a judgment in this case and contends that it is worried  
4       about Nugget's financial resources being dissipated. See North  
5       Star's Motion to Compel, p. 8 of 12. North Star fails to cite  
6       any law that renders financial information discoverable to  
7       assist a party in preparing for the future collectability of a  
8       judgment. The purpose of pretrial discovery is to prepare for  
9       trial of issues, not to uncover assets that might be applied  
10      toward the satisfaction of a judgment. See *Clauss v. Danker*,  
11      264 F. Supp. 246 (S.D.N.Y. 1967).  
12  
13

14                   North Star also seeks Nugget's financial information  
15      to evaluate the case's settlement value. See North Star's  
16      Motion to Compel, p. 8 of 12. North Star's discovery of  
17      Nugget's wealth is irrelevant to settlement and is not an  
18      appropriate basis for seeking discovery. Moreover, Nugget has  
19      continuously maintained that North Star's claims are spurious  
20      and unsubstantiated. The discovery of Nugget's financial  
21      resources absent actual factual basis for the award of punitive  
22      damages would unnecessarily invade Nugget's confidential and  
23  
24

25                   U.S. ex rel. *North Star, et al. v. Nugget Construction, et al.*  
                 Case No. A98-009 CIV (HRH)  
                 Defendant Nugget Construction, Inc.'s Memorandum  
                 in Opposition to Plaintiff and Use-Plaintiff  
                 North Star Terminal and Stevedoring Company's  
                 Motion To Compel Discovery -- Page 9 of 18

1 proprietary rights. Therefore, there is absolutely no need for  
2 North Star to engage in the pretrial discovery of Nugget's  
3 financial conditions.

4  
5 North Star's requests for Nugget's financial  
6 information are premature and unnecessary at this time. North  
7 Star will not be prejudiced if it obtains such information after  
8 the liability phase of trial. The Court can allow the parties  
9 to engage in expedited discovery on North Star's punitive damage  
10 claims, including information related to Nugget's wealth and  
11 financial condition, before resuming trial on the punitive  
12 damage claims. Such an approach saves the judicial system time,  
13 and preserves the confidential and proprietary rights of Nugget.  
14

15                   II. NUGGET'S INSURANCE INFORMATION

16  
17 A. Insurance and Indemnity Agreements

18  
19 North Star moves to compel the production of Nugget's  
20 insurance agreements. Nugget does not dispute Federal Civil  
21 Rule 26(a)(1)(D) allows for the inspection and copying of  
22 insurance agreements that may be liable to satisfy part or all  
23 of a judgment. However, this is a claim for economic loss, not  
24

25                   *U.S. ex rel. North Star, et al. v. Nugget Construction, et al.*

Case No. A98-009 CIV (HRH)

Defendant Nugget Construction, Inc.'s Memorandum  
in Opposition to Plaintiff and Use-Plaintiff  
North Star Terminal and Stevedoring Company's  
Motion To Compel Discovery -- Page 10 of 18

1 property damage, personal injury, or wrongful death.  
2 Consequently, there are not any insurance policies that apply to  
3 this type of claim.

4

5 Nugget indicated in its Rule 26(a)(1)(D) disclosure  
6 that it has no insurance agreement applicable to North Star's  
7 Miller Act or state law claims. Nugget also revealed in its  
8 discovery responses that there are no documents referencing any  
9 insurance agreement pertinent to North Star's claims. In  
10 effect, Nugget does not possess any agreement or policy under  
11 which an insurance business may be liable to satisfy any  
12 judgment which might be entered against it in this case. The  
13 federal rules do not require Nugget to produce more than it has  
14 already provided pursuant to its mandatory disclosure  
15 obligation. The federal rules also do not entitle North Star to  
16 scrutinize all insurance agreements that Nugget may have in  
17 order to make its own determination regarding potential  
18 coverage.

19

20 Nevertheless, John Smithson testified on behalf of  
21 Nugget that he would confirm with Nugget's insurance carrier  
22 whether any policies dating back from 1997 might provide  
23  
*U.S. ex rel. North Star, et al. v. Nugget Construction, et al.*  
24 Case No. A98-009 CIV (HRH)  
25 Defendant Nugget Construction, Inc.'s Memorandum  
in Opposition to Plaintiff and Use-Plaintiff  
North Star Terminal and Stevedoring Company's  
Motion To Compel Discovery -- Page 11 of 18

1 coverage to the Homer Spit Project. See Attached Exhibit B,  
2 p. 81, lines 13-22. Nugget's counsel also agreed that any  
3 insurance policies or agreements which might cover North Star's  
4 allegations will be forwarded to North Star's counsel. See  
5 Attached Exhibit B, p. 79, lines 18-25; p. 80, lines 1-13.  
6 Moreover, when Nugget made its Fed. R. Civ. P. 26(a)(1)(D)  
7 Second Supplemental Disclosures on October 26, 2005, and  
8 responded to North Star's discovery requests on November 8,  
9 2005, that to the best of Nugget's knowledge and belief at those  
10 times, there were no known insurance agreements that would cover  
11 North Star's numerous claims. Nugget specifically stated that  
12 it would supplement its responses should new or different  
13 information become known through discovery. However, to date,  
14 North Star has failed to develop a basis why Nugget's insurance  
15 policies would provide coverage for the claims asserted by North  
16 Star.

17  
18 B. Other Insurance Information and Documents

19  
20 Although Nugget agrees to disclose any applicable  
21 insurance agreements, Nugget contests the disclosure requested  
22 in North Star's overbroad and sweeping demand for "any  
23 U.S. ex rel. North Star, et al. v. Nugget Construction, et al.  
24 Case No. A98-009 CIV (HRH)  
25 Defendant Nugget Construction, Inc.'s Memorandum  
in Opposition to Plaintiff and Use-Plaintiff  
North Star Terminal and Stevedoring Company's  
Motion To Compel Discovery -- Page 12 of 18

1 information and documents regarding Nugget claims against  
2 insurance." See North Star's Motion to Compel, page 11 of 12,  
3 lines 14-15. North Star is not entitled to any of Nugget's  
4 insurance information and documents, including "claims against  
5 insurance," to the extent they contain personal and financial  
6 information or have no relation to the claims and defenses  
7 asserted in this case. The Advisory Committee Notes on Fed. R.  
8 Civ. P. 26(b)(2) clearly state the limitations on the disclosure  
9 of insurance coverage: that insurance should be distinguished  
10 from any other facts concerning a defendant's financial status:  
11 (1) because insurance is an asset created specifically to  
12 satisfy the claim; (2) because the insurance company ordinarily  
13 controls the litigation; (3) because the information about  
14 coverage is available only from defendant or his insurer; and  
15 (4) because disclosure does not involve a significant invasion  
16 of privacy.

17 Further, the Advisory Committee comments that "the  
18 insurance application may contain personal and financial  
19 information concerning the insured, discovery of which is beyond  
20 the purpose of this provision," and that "in no instance does  
21

22 U.S. ex rel. North Star, et al. v. Nugget Construction, et al.

23 Case No. A98-009 CIV (HRH)

24 Defendant Nugget Construction, Inc.'s Memorandum  
25 in Opposition to Plaintiff and Use-Plaintiff  
North Star Terminal and Stevedoring Company's  
Motion To Compel Discovery -- Page 13 of 18

1 disclosure make the facts concerning insurance coverage  
2 admissible in evidence." See also Fed. R. Evid. 411.<sup>3</sup> As North  
3 Star correctly points out, Fed. R. Civ. P. 26(a)(1)(D) replaces  
4 subdivision (b)(2) of Rule 26, but such change does not signify  
5 any change of law. See North Star's Motion to Compel, page 9 of  
6 12. As such, North Star's discovery of Nugget's insurance  
7 information should be limited so as to prevent North Star from  
8 invading Nugget's confidential personal and financial  
9 information. Nugget requests the Court deny North Star's  
10 efforts to obtain insurance information beyond that which is  
11 allowed under the federal rules.

12

13 C. Deposition Testimony of Insurance Information

14

15 In addition, Nugget requests the Court to reject North  
16 Star's demand to depose Nugget's insurance agent and John  
17 Terwilliger as part of Nugget's continuing 30(b)(6) deposition.  
18 First, nowhere in the federal rules is Nugget required to offer

20

---

21 <sup>3</sup> Federal Rule of Evidence 411: Liability Insurance: Evidence that a person  
22 was or was not insured against liability is not admissible upon the issue  
23 whether the person acted negligently or otherwise wrongfully. This rule does  
24 not require the exclusion of evidence of insurance against liability when  
offered for another purpose, such as proof of agency, ownership, or control,  
or bias or prejudice of a witness.

25 U.S. ex rel. North Star, et al. v. Nugget Construction, et al.  
Case No. A98-009 CIV (HRH)  
Defendant Nugget Construction, Inc.'s Memorandum  
in Opposition to Plaintiff and Use-Plaintiff  
North Star Terminal and Stevedoring Company's  
Motion To Compel Discovery -- Page 14 of 18

1 the insurance carrier, its agents, employees, or representatives  
2 to testify as Nugget's 30(b)(6) designee. The rule is clear and  
3 simple: where a 30(b)(6) notice is propounded on a private  
4 corporation, "the organization so named shall designate one or  
5 more officers, directors, or managing agents, or other persons  
6 who consent to testify on its behalf . . . ." The insurance  
7 agent is not an officer, director, or managing partner of Nugget  
8 and has no corporate affiliation with Nugget by any stretch of  
9 the imagination. If North Star seeks Nugget's insurance agent  
10 to testify on Nugget's insurance matters, then it has other  
11 available means to procure the testimony, i.e., Fed. R. Civ.  
12 P. 30(a)(1) or 31(a)(1).

15 Second, even if Nugget could offer John Terwilliger as  
16 a 30(b)(6) deponent, Mr. Terwilliger's deteriorating health  
17 conditions continue to hinder his availability and capacity to  
18 testify in this case. North Star's callous insistence on  
19 Mr. Terwilliger's testimony blatantly ignores his vulnerable  
20 state of health. Should North Star continue to persist on  
21 Mr. Terwilliger's testimony, then Nugget will seek a protective  
22 order under Fed. R. Civ. P. 26(c) and seek sanctions under Fed.

24 U.S. ex rel. North Star, et al. v. Nugget Construction, et al.  
25 Case No. A98-009 CIV (HRH)  
Defendant Nugget Construction, Inc.'s Memorandum  
in Opposition to Plaintiff and Use-Plaintiff  
North Star Terminal and Stevedoring Company's  
Motion To Compel Discovery -- Page 15 of 18

1 R. Civ. P. 37(a)(4). And should the Court require Nugget to  
 2 produce a deponent to testify on its insurance matters, Nugget  
 3 requests that the Court limit the testimony to the remaining  
 4 time allowed for North Star's recommencement of its 30(b)(6)  
 5 deposition so as not to exceed the seven (7) hour maximum  
 6 afforded under Fed. R. Civ. P. 30(d)(2).  
 7

8                   III. EXPENSES INCURRED IN OPPOSING NORTH STAR'S  
 9                   MOTION TO COMPEL AND CONCLUSION

10                  Pursuant to Fed. R. Civ. P. 37(a)(4)(B), Nugget  
 11 requests that it be awarded its reasonable costs and expenses  
 12 incurred in opposing North Star's Motion to Compel. In the  
 13 alternative, should the court grant in part or deny in part  
 14 North Star's motion, that the court "apportion the reasonable  
 15 expenses incurred in relation to the motion among the parties  
 16 and persons in a just matter" pursuant to Federal Rule of Civil  
 17 Procedure 37(a)(4)(C). For all the foregoing reasons, the Court  
 18 should deny North Star's Motion to Compel Discovery and award  
 19 Nugget its reasonable costs expended on opposing North Star's  
 20 motion.  
 21  
 22  
 23  
 24

25                  *U.S. ex rel. North Star, et al. v. Nugget Construction, et al.*

Case No. A98-009 CIV (HRH)

Defendant Nugget Construction, Inc.'s Memorandum  
 in Opposition to Plaintiff and Use-Plaintiff  
 North Star Terminal and Stevedoring Company's  
 Motion To Compel Discovery -- Page 16 of 18

1 Dated: December 27, 2005

OLES MORRISON RINKER & BAKER LLP  
2 Attorneys for Nugget Construction,  
3 Inc., and United States  
Fidelity and Guaranty Co.

4 By:

5   
Traeger Machetanz  
6 Alaska Bar No. 8411127  
7 Gloria Ho  
Alaska Bar No. 0507064

8 P-GYH 092 OPP mot to compel 122205

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**OLES MORRISON RINKER & BAKER LLP**  
745 West Fourth Avenue, Suite 502  
Anchorage, Alaska 99501-2136  
Tel: (907) 258-0106 Fax: (907) 258-5519

U.S. ex rel. North Star, et al. v. Nugget Construction, et al.  
Case No. A98-009 CIV (HRH)  
Defendant Nugget Construction, Inc.'s Memorandum  
in Opposition to Plaintiff and Use-Plaintiff  
North Star Terminal and Stevedoring Company's  
Motion To Compel Discovery -- Page 17 of 18

1                   CERTIFICATE OF SERVICE

2                   I hereby certify that on this 27<sup>th</sup>  
3                   day of December, 2005, a true and correct  
4                   copy of the foregoing was mailed/hand  
5                   delivered, as indicated, to:

6                   Michael W. Sewright, Esq. - **via hand delivery**  
7                   Burr, Pease & Kurtz  
8                   810 N Street  
9                   Anchorage, AK 99501

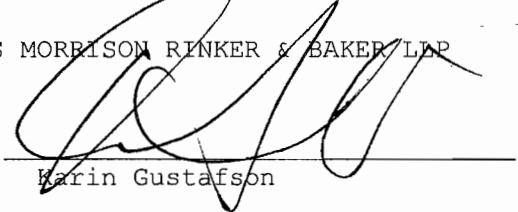
10                  Steven J. Shamburek, Esq. - **via hand delivery**  
11                  Law Office of Steven J. Shamburek  
12                  425 G Street, Suite 630  
13                  Anchorage, AK 99501-5872

14                  Paul Stockler, Esq. - **via hand delivery**  
15                  1309 West 16<sup>th</sup> Avenue  
16                  Anchorage, AK 99501

17                  C. Patrick Stoll, Esq. - **via U.S. Mail**  
18                  Herrig Vogt & Stoll LLP  
19                  4210 Douglas Bay Blvd., Suite 100  
20                  Granite Bay, CA 95746-5902

21                  Herbert A. Viergutz, Esq. - **via hand delivery**  
22                  Barokas Martin & Tomlinson  
23                  1029 West Third, Suite 280  
24                  Anchorage, AK 99501

25                  OLES MORRISON RINKER & BAKER LLP

By:   
Karin Gustafson